No. 11,807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

FRANK ROWLEY,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court is based upon Alaska Compiled Laws (1933), Title 3, and 48 U.S.C.A. Section 101 (Territories and Insular Possessions). This Court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

STATEMENT OF THE CASE.

THE PLEADINGS.

Appellee's amended complaint was filed December 6, 1946. (T. R. 6.)

It charged that on July 30, 1946, at Anchorage, Alaska, appellant unlawfully, without cause or prov-

ocation, violently, wrongfully, wantonly, maliciously, grossly, deliberately and outrageously made an assault upon appellee and beat, wounded and injured appellee by striking him on the head with an instrument, which appellee alleged on information and belief, was a long-handled garden rake, an instrument or weapon calculated to inflict great bodily injury; that appellee thereby suffered a depressed compound fracture of the skull, lacerations and destruction of the brain and the deposit therein of a metal foreign body and hair, bone and dirt; that appellee has and will suffer sickness, great bodily pain, discomfort and mental suffering from said wound; that appellee was seriously injured and disabled and was confined in the hospital for twenty-nine days; that at the time of filing the amended complaint, appellee was totally disabled and unable to perform any work; that in the treatment of his wounds appellee incurred hospital bills of $657.25, doctor bills of $2500, and damages of $50,000. In his amended complaint, appellee demanded judgment for $50,000 actual damages and $25,000 exemplary damages, or a total of $75,000. (T. R. 5, 6.)

Appellant's answer consists of a general denial of all of the allegations and appellee's complaint. (T. R. 4.)

THE CRIMINAL CASE.

Just prior to the trial of this case, appellant had been convicted in the District Court of the United States for the Territory of Alaska, Third Division,

of the crime of assault with a dangerous weapon upon appellee. That case arose out of the same altercation as in the instant case. The criminal case is now on appeal in this Court, being case No. 11,545.

THE TRIAL.

At the outset of the case, the parties, in open Court, stipulated to waive trial of this case by jury and that the Court should consider as being in evidence and before the Court all of the testimony and evidence given in the trial of the criminal case of *United States of America v. Z. E. Eagleston* (District Court No. 1986 Crim.; Circuit Court of Appeals No. 11,545), and that either of the parties might adduce additional evidence bearing upon the physical condition of appellee or relating to damages, as well as evidence upon any other feature of the case not adequately covered by the evidence in the criminal case. (T. R. 28.)

This Court ordered the printing of the Bill of Exceptions in the criminal case dispensed with and directed that the printed Transcript of the Record in the criminal case No. 11,545 be used by this Court on this appeal. (T. R. 188.) For the convenience of the Court, reference to the two transcripts in this brief will be marked as follows: criminal case "Crim. T. R.", civil case "T. R."

The Court, pursuant to an order of examination and with the consent of appellee's attorneys appointed the following physicians to make an exam-

ination of appellee: Drs. A. S. Walkowski, R. B. Coffin and George G. Davis. (T. R. 25, 26.)

THE EVIDENCE.

The incident out of which this case arose occurred in Anchorage, Alaska, about 8:45 a. m., on July 30, 1946. (Crim. T. R. 48.) Appellant, at that time, was the owner of a salvage yard where second-hand equipment was sold. (Crim. T. R. 189.) Appellee was an electrical worker and was engaged in installing an electrical system in Mt. View, Alaska. (Crim. T. R. 171.)

Shortly before July 30, 1946, appellant visited appellee at Mt. View, Alaska, and had a discussion with him about the purchase of a couple of war surplus generating plants. During this talk it developed that appellant owned an oil tank in which appellee expressed an interest (Crim. T. R. 171, 172) and there was some discussion about the price of the oil tank.

On July 30, 1946, at about 7:30 a. m. appellee, together with one Ken Hinchey, went to appellant's salvage yard in Anchorage, Alaska, for the purpose of purchasing and taking away the oil tank. Appellant was not there at the time. (Crim. T. R. 173.) George Miles, an employee of appellant, arrived at the yard shortly thereafter. (Crim. T. R. 173.) Appellee told Miles that he wished to buy the tank for $150. (Crim. T. R. 248.) Miles replied that he thought this was a low price and asked appellee whether he had

talked to appellant about it. Appellee said he had not. Miles then suggested that appellee see appellant about the price. (Crim. T. R. 248.) Appellee and Miles got into appellee's pick-up truck and began to hunt for appellant. (Crim. T. R. 248.) They first went to appellant's house. He was not there. They went to the Alta Club (Crim. T. R. 190) and then circled back to appellant's house and entered the back yard from the alley in the rear of the house. (Crim. T. R. 190.) Dave Foote, appellant's truck driver and handyman, was in the back yard at the time. (Crim. T. R. 190, 248.)

Appellee and Miles entered the house through the rear door, crossed a hallway and knocked at a door leading to appellant's bedroom. (Crim. T. R. 181, 248.) Appellant came to the bedroom door and said, "What the hell is your hurry, can't you wait a few minutes?" (Crim. T. R. 248, 415.) Miles told appellant that appellee was ready to take the oil tank from his junk yard, and that appellee insisted that the purchase price was $150. (Crim. T. R. 191, 415.) Appellant maintained that the price of the tank was $250. (Crim. T. R. 249, 416.) After some argument between them over the price, and after Miles left the house and went into the yard (Crim. T. R. 191, 249) appellant finally told appellee that the price was either $250 or nothing, and said: "Now don't call me a liar in my own house." (Crim. T. R. 416, 192, 96.) Appellee stepped outside the rear door and replied: "You are a liar". (Crim. T. R. 416, 90, 96.) Appel-

lant at that time was standing in the doorway of his house. (Crim. T. R. 90, 175.)

Miles testified that when he was five or six feet outside the door, he heard appellant tell appellee that the latter could not argue with him in his own house. This was immediately after Miles had left the house. (Crim. T. R. 249.) Miles also heard appellant tell appellee, "You can't call me a liar." (Crim. T. R. 192.) Furthermore, appellee said something to appellant that Miles could not hear, but Miles did hear appellant immediately thereafter say, "Take off your glasses." (Crim. T. R. 249.) Appellee took off his glasses and laid them on a stove just outside the door. (Crim. T. R. 416.)

Appellant took off his glasses and put them on a box. (Crim. T. R. 90.) Both men put up their hands and started to spar. (Crim. T. R. 91, 416, 127, 279.)

At this time Miles and Foote were in the yard. Behind appellee in the yard was a wood and trash pile (Crim. T. R. 78, Exhibits 1 to 4, Crim. T. R. 52-54) about twenty feet from the door of the house. (Crim. T. R. 226-7.) On the right of the yard, facing the alleyway, was a shed against which tools, implements and junk were strewn. (Exhibits 1 to 4, Crim. T. R. 52-54; 97.)

Evidence Conflicting as to Who Struck First Blow and Progress of Fight.

There is a sharp conflict as to who struck the first blow. Appellant testified that appellee struck first. (Crim. T. R. 416.) Appellee claimed that appellant

struck first (Crim. T. R. 175); in this he was corroborated by Foote (Crim. T. R. 91) and Miles (Crim. T. R. 192, 249). Louis Strutz, who had driven into the alley for the purpose of picking up a carton from among the rubbish in the alley (Crim. T. R. 254), testified that appellee was facing appellant with clenched fists. (Crim. T. R. 279.)

The evidence is also conflicting as to the details of the altercation that followed. Appellant testified:

> "As he took off his glasses and laid them down, we were sparring around (demonstrating)—we were hitting at one another and I was fast getting out of breath, and there were two or three blows he struck me that would have been counted. And as he hit me, I hit him on the left side, which caused him to turn around. I hit him and give him a shove and he got on the ground. He started to get up and I stepped back with my foot behind me—I grabbed ahold of the rake and lifted it up in this position." (Crim. T. R. 417.)

Appellant further testified that he grabbed the rake because he became winded grappling with appellee and wanted him to stop—that he (appellant) was through and wanted the fight to be through; that he wanted only to scare appellee (Crim. T. R. 417) and did not strike him with the rake or with any other implement or weapon. (Crim. T. R. 418.)

Corroborating appellant's contention that he was trying to withdraw and end the fight, is the testimony of Foote, who said that as appellee was falling the

first time appellant was backing away from him toward the door of his house. (Crim. T. R. 91, 93.)

All that appellee recalls is that appellant struck him once with his fist (Crim. T. R. 175) and he went backwards, rolled over on his left side and tried to pick himself up (Crim. T. R. 176) and that appellant subsequently picked up an instrument and raised it over his head. (Crim. T. R. 177.)

Appellee felt a pain in his head. (Crim. T. R. 177.) However, he was unable to state definitely whether he felt this sensation of pain before or after he fell to the ground. (Crim. T. R. 178.)

Miles, who, at the time of the trial had been discharged by appellant (Crim. T. R. 189), testified that appellant struck appellee with a rake after appellee was on the ground. (Crim. T. R. 193, 249.)

Foote testified appellant hit appellee with his right hand and that appellee fell on his right side into the woodpile (Crim. T. R. 91, 96), rose two-thirds of the way up and again fell, this time on his left side, head first against the wall (Crim. T. R. 92, 93, 97, 98); that there were shovels, rakes and a pick up on a shed toward which appellee fell and that they were falling off the shed as appellee fell toward it. (Crim. T. R. 97.)

While Foote testified he took a rake from appellant's hand while appellee was on the ground (Crim. T. R. 97), he repeatedly testified that he never saw appellant strike appellee with it. (Crim. T. R. 97, 121.) Moreover, Foote testified that after appellee

fell his head was resting on a blood-stained shovel (Crim. T. R. 112, 122) in a wood pile (Crim. T. R. 91) which contained a number of other tools. (Crim. T. R. 110.)

Strutz testified that although he saw appellant wield a long-handled instrument, he did not see him strike anybody with it. (Crim. T. R. 255, 259, 264, 265, 282.)

Appellant testified that he picked up a rake while appellee was on the ground. (Crim. T. R. 417-8.)

There is an abundance of evidence substantiating appellant's position that appellee's injuries resulted from a fall into the woodpile while he was sparring with appellant. (Crim. T. R. 91, 96, 101, 115, 121, 175, 417.)

Testimony Relating to Damages.

Testimony of Physicians.

Dr. Romig (called on behalf of appellee).

He testified he attended appellee on July 30, 1946 (the date of the altercation) and examined him the day before the opening of the trial in the presence of three other doctors. When he first saw him on July 30, appellee was suffering from a compound comminuted, depressed fracture of the skull—in other words, the wound was open, there were many fragments, some of which were shoved down into the brain substance. In addition to treating appellee for the fracture, the doctor treated him for laceration of the brain, the dura, and hemorrhage and shock. (T. R. 31.)

Appellee, after having been treated with various antitoxins, was brought out of a small degree of shock and taken to the operating room. There the doctor made an incision in appellee's head, reaching from the front of his scalp to the mid-back portion of the scalp. This incision was extended laterally sufficient to allow an operation on the fracture hereinbefore described. (At this point the doctor used a photograph (Plaintiff's Exhibit 8 in the criminal case) to illustrate the extent of the fracture. (T. R. 32.)

Having exposed the fracture and the destroyed brain tissue, the doctor removed a considerable number of small fragments of bone from appellee's brain. Most of these fragments had hair clinging to them. About two-thirds of an ounce by volume of destroyed brain tissue was removed. Bleeding was controlled by tying off two large veins. The wound was irrigated, the dura sutured over the defect, and the usable bone fragments were cleaned and replaced on top of the dura. A good number of the bone fragments had to be thrown away. The deepest fragment removed from appellee's brain was one and one-quarter inch below the outside of the skull. These fragments were located in the frontal parietal area. After the dura had been stitched, and covered with bone, the scalp was sutured and the patient returned to his room. X-rays, taken before the operation, were used by the doctor during the operation. (T. R. 32, 33.)

The X-rays depicted the bone fragments in the forward part of the skull and a thin fracture line running from just above appellee's nose up to the comminuted area and then backwards to the vortex of the skull. (T. R. 34.) This fracture connected with the frontal sinus and one of the air spaces connected with appellee's nose. (T. R. 35.)

X-ray, Exhibit No. 13, showed a bone fragment in the brain substance. This is presumably the one removed by the doctor. (T. R. 35.)

(The doctor then described nine photographs taken during the progress of the operation (T. R. 36, 37, 38) by a police officer. (T. R. 30).)

X-rays taken some two weeks after the operation showed an area of decreased density between the brain and the skull indicating that air had infiltrated from the sinus through the fracture. (T. R. 37.)

After replacing bone fragments in the wound, there was a space between the size of a quarter and a fifty-cent piece in which no bone remained. A piece of bone was placed in the middle of this area in the hope that it would cover the area. (T. R. 38.)

Although appellee complained of numbness in his left arm, examination showed no positive findings as far as the arm was concerned. (T. R. 38.) His course in the hospital was very satisfactory—fever was never high and subsided in a few days. (T. R. 39.)

X-rays were taken at regular intervals after the injury. In analyzing Exhibit 105 (an X-ray), the doctor stated that the decreased density thereon

indicated the presence of air, but, in response to a question from the Court, admitted that this appearance could represent an absence of bone. (T. R. 39.)

(Stereopticon film X-rays were described by the doctor in order to show the fracture line and the position of the replaced bone fragments hereinbefore described. (T. R. 39, 40).)

On August 21st, appellee's progress at the hospital was considered as highly satisfactory. This judgment was corroborated by one or two other doctors who had seen him, and accordingly appellee was sent home. (T. R. 40.) Appellee's mental capacities had been dulled and that this symptom had become more apparent in the few weeks immediately preceding the trial. At the time of the trial appellee *complained* of dizziness, headache, ringing in his ears, inability to function mathematically at times, and increased fatigability. (T. R. 41.)

His findings were based upon the symptoms given him by the patient and upon the history of the case, which began July 30th and ran until the date of the trial. (T. R. 44.) His prognosis was based upon his diagnosis and his *recent* study of *a medical textbook*—"Wechsler's Textbook of Neurology", published by W. B. Saunders & Co., and upon "Attorneys Textbook of Medicine" by Gray, published by Matthew Bender and Company. (T. R. 44, 45.)

The doctor further testified:

> "Wechsler is an outstanding authority, and the other as I understand it is a medical testbook for

attorneys. I have not been acquainted with it until a late date, but Wechsler I have been acquainted with for many years. I think this attorney's textbook of medicine came from the Judge's chambers. I read on the inner part of the cover, 'Property of the United States for use of the District Judge.' Based upon my diagnosis and study of the text you have mentioned, and my experience as a surgeon and physician, my prognosis in this particular case of Mr. Rowley is unfavorable." (T. R. 45.)

The doctor then testified that appellee might have no end to his headaches, dizziness, ringing in his ears, nervousness, fatigability, nightmares and insomnia; that these symptoms might become worse and that epilepsy could ensue.

"Wechsler's Textbook places that at five and ten per cent up to thirty in severe injuries." (T. R. 45.)

He said that the outcome of epilepsy depends largely upon the amount of brain tissue destroyed and the proximity of the damaged brain tissue to the motor centers.

"By Wechsler placing it at 10 to 30 per cent, they estimate that a man with a severe head injury has about a 10% chance of becoming a confirmed epileptic, and in some types of injury, but not specifically the one involved, it is even known to be higher. Not only could he have that as a complication, but he could have, even at a late date, meningitis—inasmuch as it communicates with the sinus, he could even have a brain abscess." (T. R. 45, 46.)

He testified that appellee's condition, at the time of the trial was no better than when he left the hospital; that it was possible that appellee could go through the remainder of his life without any epilepsy; that epilepsy and the continuance of the discomforts of headaches, dizziness, ringing in the ears, nervousness, fatigability and sleeplessness might not happen, but appellee will always have some measure of his present discomfort. (T. R. 46.)

The doctor then proceeded to read into the record the following from page 538 of Wechsler's Textbook:

> " 'Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases. The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late menginitis. Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep reflexes, drop in blood pressure, and fixed, dilated pupils are of ominous significance. In general, fractures of the skull are not only immediately serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupations or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility

of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy, and even optic atrophy may remain after fracture of the skull.' " (T. R. 46, 47.)

He went on to explain that injuries to the frontal area of the brain are generally worse than in other areas. Referring to the fracture in the frontal sinus, he again quoted from Wechsler as follows:

" '* * * fracture through the frontal sinus may result in late meningitis.' " (T. R. 47.)

The doctor then further summarized Wechsler's Textbook (pp. 254 and 255) in the following language:

"'This is pages 254 and 255, and I think, with the permission of the Judge, I would like to just brief this because it is a little boring to read the whole thing. From these pages I glean the following facts: That after an injury of this type headache follows in 67 per cent of the cases. This is intractable in some cases. Also dizziness, ringing of the ears, optic nerve injury, deafness, nervousness, fatigability, insomnia—the percentages are as follows: Dizziness, 60 per cent; ringing of the ears, 9 per cent; optic nerve atrophy, 19 per cent; deafness, 11 per cent; nervousness, 20 per cent; fatigability, 13 per cent; insomnia, 7 per cent. In other words, according to these percentage figures, considering Mr. Rowley's injury, he has a great likelihood of never ever being free of any one of these miserable symptoms. He has at the present time headache, dizziness, ringing of the ears, nervousness, fatigability, and insomnia." (T. R. 48.)

He stated that appellee told him that he had all of the symptoms *described above in Wechsler* and that he had never been free from headache for more than two days, "according to his story" (T. R. 48):

> "There is no other authority I would care to read to the Court in connection with my prognosis." (T. R. 49.)

The doctor stated that appellee could not return to regular work at the time of the trial and he could not say when he would be able to return to his regular job—that there was a chance of his never being able to hold down a regular job; that however he had advised appellee to work; that it was part of his treatment and was necessary to his recovery. At the time appellee left the hospital he advised him to move about moderately, increase his amount of exercise and begin gradually to work—in the lines of his electrical work (T. R. 49), the amount or quantity of work he was to do being more or less up to appellee. (T. R. 49.) Appellee was to work until he became tired and then cease. (T. R. 49.)

> "I do not know that he will ever be able to hold a job. However, I would not be surprised if he could. The outlook as far as that is concerned is rather indefinite." (T. R. 49.)

The doctor then stated that he felt that appellee should seek the services of a specialist at a recognized medical center, preferably Mayo's, and that it might be possible that the specialist would decide to reopen the skull to remove scar tissue and bone frag-

ments. This would entail a cost of as much as $1400. He expected appellee to be under a physician's care for a considerable period of time. (T. R. 50.) His fee for services to appellee was $750, although he admitted he had originally asked for $2500. (The Court will note that in appellee's amended complaint, the fee for physician's services is listed at $2500. (T. R. 6.))

He had performed three operations of the type performed on appellee, in one of which the patient died. He had not performed an operation of this type for eight or nine years. (T. R. 51.)

That appellee had previously lost an eye and had a scar on his scalp; that these injuries were of no significance as far as this case was concerned; although there could have been a previous fracture on account of the scar on the scalp. (T. R. 54.)

Dr. Walkowski (one of the three physicians appointed by the Court to examine appellee, and called as a witness by appellee).

He testified that appellee had sustained a skull fracture; a tear of the fibrous covering of the brain and loss of brain tissue in the right frontal lobe. He did not see these things. His diagnosis was based on the statements made by appellee as to his feelings and sensations and his examination and interpretation of the X-rays. (T. R. 58.) Because of this limited diagnosis his prognosis was incomplete. A proper prognosis should be based upon a longer observation of the patient. (T. R. 59.)

He found no symptoms of epilepsy (T. R. 60), and was in no position to make a positive statement as to late meningitis. (T. R. 61.) Headaches and dizziness could very well continue, but he would not estimate for what length of time. (T. R. 61, 62.) He was unable to state any possibility of insanity. (T. R. 62.) While appellee had suffered a severe brain injury, the loss of two-thirds of an ounce of brain tissue from the frontal lobe of the brain could, or could not, result in personability changes. (T. R. 62.)

His diagnosis of headaches, dizziness and ringing in the ears was based solely on the word of appellee. (T. R. 63.)

The dark area on the X-rays (which Dr. Romig attributed to the presence of air) could be merely loss of substance and not air. (T. R. 64.) There was no present indication of any cerebral spinal fluid being discharged through the nose so as to indicate that the skull fracture had extended into the sinus. In this connection the examining physicians had appellee blow his nose to examine the resulting secretion. (T. R. 64, 65.)

The physicians appointed by the Court gave a rather thorough manual examination of appellee; that his equilibrium was normal; his contraction was equal on both sides, and that he was a normally strong man with respect to his arms, shoulders and legs. (T. R. 65, 66.)

Appellee would be benefited by working up to the limit of his capacity and that he was not in a posi-

tion to say just what amount of work appellee might be able to do. (T. R. 66.) Appellee was given coordination tests by the examining doctors, known as aviation tests, and his response thereto was within normal limits. (T. R. 66, 67.) Presently, appellee is in pretty good physical condition. (T. R. 67.)

Appellee should endeavor to try working at his occupation before considering any trip to a clinic such as Mayo Brothers. (T. R. 67.)

Dr. Coffin (one of the three physicians appointed by the Court to examine appellee, and called as a witness by appellee).

He testified that he had seen appellee on the morning of the injury. He had a laceration of the scalp with brain tissue protruding through the wound. He helped shave appellee's hair to prepare the wound for operation. His description of the laceration was very approximate as he did not follow the case. The wound was approximately three inches long on the right frontal area of the scalp. (T. R. 71, 72.)

His next contact with appellee was at his examination at the Court's direction. Appellee showed some clumsiness in physical and mental activities. He had no paralysis or loss of reflexes. He complained of headache, dizziness, ringing of the ears and sense of unsteadiness. The prognosis as to life is good, but as to full recovery of complete mental, emotional and physical efficiency, rather poor. He would counsel appellee to follow further specialized medical treatment and not to assume any regular work at the

present time. He should attempt, however, to work at the present time, basing his ability so to do upon whether it caused severe headaches or exaggeration of his symptoms of dizziness and unsteadiness. His ability to work would have to be left to HIS DISCRETION. (T. R. 72, 73.)

The doctor had no opinion as to a specified time when appellee's symptoms might stop. (T. R. 73.) It was not likely that scar tissue resulting from appellee's wound would have to be removed—that it was not common practice to remove these scarred areas. Fragments of skull beneath the level of the skull might have to be removed if they produced pressure symptoms. (T. R. 74.)

Appellee responded very well to the equilibrium tests given by the doctors; his strength was good as were his reflexes. (T. R. 75, 76.)

Dr. Davis (one of the three physicians appointed by the Court to examine appellee, and called as a witness by appellant).

He testified that he first saw appellee the day he was injured; appellee had a laceration about three inches long in the right frontal region and brain material was escaping. He looked at it and could see that it was a depressed fracture. He did not see any fragments of skull. (T. R. 79.) When the doctors examined appellee the day before the trial it was agreed that they would first take the subjective symptoms—those which the patient felt or complained of as distinguished from what might be observed. Ap-

pellee stated he had a headache and pointed to the area of the healed laceration at about the border of the hair line. He stated that the attacks were not present all the time; that he had none at the time of the examination; that he had had one the night before and that they came and went at times. He complained of ringing of the ears at times. He complained of dizziness, but stated that he did not use a cane. (T. R. 80.) He said he had nightmares.

The fracture being in the frontal region it was deemed advisable to find out whether the functions involved in the frontal region were disturbed. These functions are intelligence, consciousness, reason and conscience. Appellee was asked and answered some arithmetic questions and other questions of general current knowledge. His answers were made readily, coherently, with little hesitation, and were generally correct. (T. R. 82.)

The doctor examined the scar resulting from the injury under discussion, and when he palpated the scar appellee complained of pain. (T. R. 82, 83.)

Appellee stated that his appetite was good and his weight had increased.

Appellee was given an equilibrium test, such as that regularly applied to aviators, which showed that he had not lost his sense of equilibrium, but that he still had a sensation of dizziness. His eyes and ears seemed normal (T. R. 83) and his nose and mucus therein gave no evidence of the existence of cerebral spinal fluid. He evidenced no loss of strength, nor loss of

reflexes. When tested for balance, his coordination was good. (R. T. 84.)

At the examination the three doctors questioned whether or not they should discuss things together and send in a combined report, but decided against this and argued that each doctor would give his individual opinion in Court. (T. R. 85.)

The X-rays showed a definite change in the patient before and after the operation. After the operation there was an excellent elevation of the depressed skull fracture. (T. R. 85.) There was a bone defect caused by lack of the fragments which Dr. Romig could not use. Between the vault of the skull and the brain there was an area of lesser density which could have resulted from the presence of air or from lack of brain tissue. (T. R. 86.) Destroyed brain tissue never regenerates. (T. R. 87.)

Appellee has not had cerebral spinal fluid in his frontal sinus, nor air in his skull. (T. R. 88.)

The doctor's diagnosis is that appellee is suffering sensory symptoms as a result of the skull fracture without loss of function of the body. (T. R. 89.) The loss of brain tissue is not very important. The entire front lobe of the brain can be taken out without loss of normal symptoms. (T. R. 89.) This is being done very day. (T. R. 90.)

The entire episode of the injury and operation and shock might have an influence upon appellee. (T. R. 90.) Loss of the brain tissue has its quota of influence and in part accounts for the presence of sub-

jective symptoms. (T. R. 91.) It is not necessary to have the scar tissue removed as the brain is not near the vault (T. R. 91, 92), nor will it be necessary in the future to remove fragments of bone from appellee's skull. The brain is not being pressed on by the bone fragments. (T. R. 92.)

Appellee is not a malingerer. He should be returned to work. As much regular work as he could stand would be an excellent thing for him. (T. R. 93.) Upon his first return to work his hours of work would be comparatively few. At the end of a month he would be working much more. (T. R. 94.)

He might have subjective symptoms for a year, but physically he could do the work. (T. R. 94.) He might be hampered by headaches, ringing of the ears and dizziness, but physically he would be able to work. (T. R. 95, 96.) The doctor would advise him to go back to work at whatever work he does. (T. R. 96.)

Appellee will not have a generalized epilepsy in the future. He might have a *petit mal* but he will not have generalized epilepsy because the injury is not over the motor areas. He will have no contractures. There is no possibility of his ever acquiring late meningitis. (T. R. 100.)

There is no infection going from the frontal sinus, from the meninges, and there will not be any subsequent from now. (T. R. 101.) There is no possibility of appellee dying from the wound he received. (T. R. 102.) Headaches and dizziness might continue for some time. (T. R. 103.) Appellee is already blind in

the right eye, but there is no possibility of his becoming blind in the left eye as a result of this injury. There is no possibility of insanity. (T. R. 104.)

There will be no loss of function. Appellee is in good condition. The litigation has had a very definite reaction upon appellee. One of the healthiest things for appellee would be the termination of the case and for him to get back to work. (T. R. 106.)

Testimony of Insurance Agent.

Hugh Daugherty (called on behalf of appellee) testified that he was an agent of the New York Life Insurance Company and had been in that business for ten years and that he had taken courses in insurance in his company and by correspondence. He was familiar with tables of expectancy and annuity and had a great deal of experience in gathering and interpreting actuarian data. The life expectancy of a man aged 41 is 27½ years. He got that information from the American Experience Table of Mortality used by all major insurance companies. That table is contained in the New York Life Insurance Company's rate book—a book used constantly in insurance work. (T. R. 132.)

Over the objection of appellant, the witness was allowed to testify that the cost of an annuity which would yield $400 a month to an individual 41 years old for the rest of his life, based upon his life expectancy, would be $122,892; $300 a month for such a man would cost $92,169, $200 a month $61,446, and $100 a month $30,723. (T. R. 132 to 135.)

The following then transpired:

"Mr. Hellenthal. Now, Mr. Daugherty, could a man who had suffered a compound, compressed, depressed fracture of the skull obtain life insurance?

Mr. Curry. We object, if the Court please. The witness hasn't qualified yet as any expert to pass upon the subject; and it is immaterial.

The Court. Objection overruled.

Witness. I would answer that 'No', that there would be no possibility of that man obtaining insurance." (T. R. 136.)

Testimony of Other Witnesses.

Frank Rowley, appellee, testified as follows: that he was forty-one years old; finished the 8th grade in school; went to a night trade school that taught electricity. (T. R. 107.) He injured his right eye when he was 13 years old which injury resulted in its removal when he was 18. He worked in orchards and did general electrical work in various states and Alaska. His earning range was from 25¢ an hour in 1922, to $350 per month in 1944. (T. R. 108-112.) He did some work for the War Department in 1945 and made as high as $450 per month for some months.

In 1945 his gross earnings, before deductions, were $5152.90.

In 1946 he made approximately $400 per month. (T. R. 113.)

At the time of the injury he was installing an electric distributing system at Mountain View, Alaska, in which he had invested $5000. Everything that he

had was invested in that business. (T. R. 113, 114.) He was married in 1933 and has five children, ranging from three to twelve years of age.

His hospital bill was $744.25. (T. R. 115.) He was in the hospital for twenty-nine days and had done some work since getting out of the hospital, consisting of work around the house. He did nothing in connection with his distributing business. He hired a man to put a generator back together at an expense of $70.00. He cannot do any lifting. He cannot climb telephone poles. He has headaches at the point of the injury which increase as he gets overly tired. Sometimes the headaches come on frequently. The longest period he had gone without a headache is one day. Other things bother him, such as ringing of the ears and dizzy spells. It hurts him to concentrate. He doesn't sleep well at night and has bad dreams. There are times that he feels good. He doesn't feel that he can go back to regular work because he cannot do any lifting. He could not stand eight hours of bench work. (T. R. 116, 117.)

In 1946 his income tax statement showed an income of $3395.05 from December 10, 1945 to September 15, 1946. He has earned nothing since the injury. (T. R. 118.) His earnings for 1945 and 1946 include overtime and he had considerable overtime. (T. R. 119.)

He suffered much pain at the time of the injury and since. He could remember very little the first three or four days in the hospital; then he seemed to gradually get better. His head hurt until he got out of the hospital and then it hurt most when he tried to

do any thinking. He feels better when he is fully relaxed. (T. R. 120, 121.)

The following then transpired:

"Q. Now Mr. Rowley, have you given much thought to your future?

A. Well, it worries me to——

Mr. Grigsby. If the Court please, we object to this line of examination as immaterial to the issues set up in the complaint. There is no claim for anything except loss of capacity to labor and pain and suffering, and the complaint contains no claim for damages for mental injury whatever except, of course, what would be inferred as affecting capacity to work, but his thoughts for the future I think are immaterial.

Mr. Hellenthal. Your Honor, I am introducing this under the complaint—to prove mental suffering.

The Court. Objection overruled. You may answer.

Witness (continuing). Well, the future does worry me to a certain extent because I have a large family and—but I try to keep from worrying as much as I can because it don't do me any good, because worry is the worst thing I can do for my health, I figure." (T. R. 121.)

Albert Henry Dyer (witness on behalf of appellee) testified that he had known appellee for four or five years; that his habits for industry, dependability and sobriety were good (T. R. 120) and that appellee has shown a lack of alertness since the injury. (T. R. 138.)

George Peterson testified that he had known appellee since May of 1945; that he was appellee's supe-

rior at Fort Richardson. He described the nature of appellee's electrical work and stated that he was a steady and sober worker. (T. R. 124, 125, 126.)

R. S. Richards testified that he had known appellee for four years and that he was a steady and sober man. (T. R. 129.)

Robert Risley testified that he had known appellee since 1941; he used to live next door to him and he belonged to the same lodge. Appellee's habits as to industry and sobriety were good. (T. R. 130, 131.) In observing appellee since the accident he is obliged to repeat questions or statements made to appellee and that he does not recall doing this before the injury. (T. R. 137.)

Mrs. Frank Rowley (the wife of appellee) testified that at the time of the accident, at the hospital, she observed mucus and blood coming from appellee's nose and throat. This continued for a period of three or four days. Since the accident appellee's mental state has been different; he responds more slowly when speaking; he takes longer to think and he seems to be hard of hearing. She did not notice these things before the injury. (T. R. 139.)

Norman C. Brown (witness on behalf of appellee) testified that he was a newspaper publisher in Anchorage; that appellant has the reputation of having some money, but that the witness does not know of his own knowledge as to his wealth. (T. R. 122, 123.)

Rose Walsh (Recorder for the Anchorage Precinct, called on behalf of appellee) testified that a real and

chattel mortgage dated November 4, 1946, had been recorded in her office, running from Z. E. Eagleston to L. McGee, covering certain real and personal property. This mortgage secured a note in the sum of $48,000 with interest at 8%. (T. R. 127, 128, 129.)

R. S. Richards testified that appellant had a reputation of a man of considerable wealth and that he was reputed to be worth a quarter of a million dollars. (T. R. 129.)

A. H. Dyer testified that he knows appellant's reputation as to wealth and that he was reputed to be worth approximately $250,000. (T. R. 130.)

L. McGee (called on behalf of appellant) testified that he loaned appellant the $48,000 and took from him the mortgage hereinabove mentioned. He had seen the real property covered by the mortgage, but he was not too familiar with the chattels listed. He did not make the loan as a business loan, nor fix the amount that he was willing to loan entirely on the value of the property. He took into consideration the fact that he had loaned appellant money before without security. The most he had previously loaned appellant, without security, was in the neighborhood of $17,000. He would not loan a substantial sum of money on the junk outside the real estate. All of the property secured by the mortgage has a market value of around $35,000. (T. R. 140 to 142.)

Z. E. Eagleston, appellant, testified that he came to Alaska in August of 1939, and that upon his arrival

he only had ten dollars. He worked for a newspaper; at the Army Base as a laborer and clerk (T. R. 142, 143) and then began collecting junk. He continued in the junk business up until the time of the trial. (T. R. 143-147.) In February, 1944, he became connected with the Alta Club as trustee and continued to take care of the Alta Club and the junk business. (T. R. 147, 160.) The mortgage given to McGee covers everything appellant owns with the exception of personal property, such as clothing. (T. R. 147.) The market value of his real and personal property is $60,000. (T. R. 148.)

At the present time he does not believe he is worth over $18,000 besides cash. (T. R. 155.) At the time he borrowed from McGee he endeavored to borrow money at the Bank of Alaska and the First National Bank without success. (T. R. 155.)

FINDINGS OF FACT, JUDGMENT AND APPEAL.

The District Court entered findings of fact (T. R. 164, also 8-10), conclusions of law and judgment awarding compensatory damages to appellee in the sum of $37,000. (T. R. 11, 12.) Appellant filed a motion for new trial which was denied on December 27, 1946 (T. R. 7), to which ruling appellant excepted and the exception was allowed. (T. R. 12, 13.) Appellant thereupon filed his petition for allowance on appeal on March 14, 1947 (T. R. 14) and filed his assignment of errors. (T. R. 15.)

SPECIFICATION OF ERRORS.

The trial Court erred in the following particulars:

1. That prejudicial error was committed in allowing Dr. Romig, a witness for appellee, to read into evidence excerpts from a medical textbook, Wechsler's Textbook of Neurology. (T. R. 45-48.)

2. That prejudicial error was committed in admitting into evidence pages 534 to 540, inclusive, subentitled "Fracture of the Skull" of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology," by Israel S. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company. (T. R. 172 to 182.)

3. The trial Court erred in its finding "that in the fixing of said amount of Thirty-seven Thousand Dollars, pages 534 to 540, inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel A. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company, were considered." (T. R. 9, 10.)

4. The trial Court's conclusion of law is erroneous in that it is based upon incompetent evidence, erroneously admitted, and an erroneous finding of the trial Court based upon said incompetent evidence. (T. R. 10.)

5. The trial Court erred in denying appellant's motion for a new trial. (T. R. 7.)

6. That prejudicial error was committed in admitting into evidence, over the objection of appellant, the

opinion of a life insurance agent as to appellee's ability to obtain life insurance. (T. R. 136.)

7. The trial Court erred in its finding "That plaintiff has been injured in the premises in the amount of Thirty-seven Thousand Dollars, all, in actual or compensatory damages;" for the reason that the sum mentioned in said finding is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted. (T. R. 9, 12, 17.)

8. That the trial Court's conclusion of law and judgment are erroneous in finding that appellee is entitled to judgment in the sum of thirty-seven thousand dollars for the reason that said sum is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted. (T. R. 10, 11, 13, 17.)

ARGUMENT.

FIRST POINT RAISED.

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO ALLOW IN EVIDENCE EXCERPTS FROM A MEDICAL TEXT-BOOK AS PART OF APPELLEE'S CASE IN CHIEF, AND TO RELY THEREON IN MAKING ITS FINDINGS, CONCLUSIONS AND JUDGMENT.

1. That prejudicial error was committed in allowing Dr. Romig, a witness for appellee, to read into evidence excerpts from a medical textbook, Wechsler's Textbook of Neurology.

2. That prejudicial error was committed in admitting into evidence pages 534 to 540, inclusive, sub-entitled "Fracture of the Skull" of "A Textbook of Clinical Neurology, with an Introduction on the History of Neurology," by Israel S. Wechsler, M.D. Fifth Edition, Revised, 1944, W. B. Saunders Company.

3. The trial Court erred in its finding "that in the fixing of said amount of thirty-seven thousand dollars, pages 534 to 540, inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company, were considered."

4. The trial Court's conclusion of law is erroneous in that it is based upon incompetent evidence, erroneously admitted, and an erroneous finding of the trial Court based upon said incompetent evidence.

5. The trial Court erred in denying appellant's motion for a new trial.

During the presentation of appellee's case in chief, Dr. Howard G. Romig, on direct examination, stated the following (T. R. 44, 45, 46):

> "The prognosis is to be called the outlook in Mr. Rowley's case, what he can expect and how comfortable he will be, or how uncomfortable he will be. *My prognosis,* in addition to being based upon my diagnosis, *is in some measure based*

upon my recent study of Wechsler's Textbook of Neurology. I do not know who publishes that textbook. *The book you hand me is a 1944 Edition of Wechsler's Textbook of Neurology,* published by W. B. Saunders & Co. *My prognosis is based also on Attorneys Textbook of Medicine,* by Gray—1940 Edition, published by Matthew Bender and Company. Wechsler is an outstanding authority, and the other as I understand it is a medical testbook for attorneys. I have not been acquainted with it until a late date, but Wechsler I have been acquainted with for many years. I think this attorney's textbook of medicine came from the Judge's chambers. I read on the inner part of the cover, 'Property of the United States for use of the District Judge.' Based upon my diagnosis *and study of the text you have mentioned,* and my experience as a surgeon and physician, my prognosis in this particular case of Mr. Rowley is unfavorable. I mean that Mr. Rowley may have no end to his headaches, to his dizziness, to the ringing in his ears, to his nervousness, to his fatigability, and his nightmares and insomnia. He may have no end to those. They may, in fact, become worse. Not only could he have those complications, but epilepsy, for example, could ensue. *Wechsler's Textbook places that at five and ten per cent up to thirty in severe injuries.* By that I mean that the outcome of epilepsy depends in large measure upon the amount of brain tissue destroyed and the proximity of the damaged brain tissue to the motor centers. *By Wechsler placing it at 10 to 30 per cent, they estimate* that a man with a severe head injury has about a 10% chance of becoming a confirmed epileptic, and in some types

of injury, but not specifically the one involved, it is even known to be higher. Not only could he have that as a complication, but he could have, even at a late date, meningitis—inasmuch as it communicates with the sinus, he could even have a brain abscess. Mr. Rowley's condition is no better, in fact, since he left the hospital. It is also possible that Mr. Rowley could go through the remainder of his life without any epilepsy. When I speak of prognosis of epilepsy, and these various disorders I have described, I do not mean it is going to happen, but in my opinion Mr. Rowley will never be free of some measure of his present discomfort. Those discomforts that he suffers now are headaches, dissiness, ringing in the ears, nervousness, fatigability, sleeplessness, and he has the one positive finding of diminished cerebration. Mr. Rowley is not mentally as capable now as I have known him before. I would say I have known him eight years. (Italics ours.)

(*Witness reads from Wechsler, page 538 of the 1944 edition,* as follows) (T. R. 46, 47):

'*Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases. The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late meningitis. Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep reflexes, drop in blood pressure, and fixed dilated*

pupils are of ominous significance. In general, fractures of the skull are not only immediately serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupations or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy, and even optic atrophy may remain after fracture of the skull.'

The lesion in this injury occurred in the frontal area, rather close in the motor cortex. That is back close to the mid portion of the brain. It roughly covers the frontal lobe. *When they said the death rate is high in lesions in the neighborhood of the medulla and frontal lobes, they mean the same frontal lobes I am now speaking of. While the medulla and frontal lobes are separated considerably, lesions in that area, according to the text, are worse than other areas of the skull.* I did point out the fracture in the frontal sinus to the Judge; that is the same frontal sinus *that they refer to here when they say that 'fracture through the frontal sinus may result in late meningitis.'* There was fracture of the vault of the skull. The fracture ran all the way from the frontal area to the posterior. He had a compound, comminuted, depressed fracture of the skull. Also he had linear fracture reaching from the front of his skull to the back of his skull.

This is page 254 and 255, and I think, with the permission of the Judge, *I would like to just*

*brief this because it is a little boring to read the whole thing. From these pages I glean the following facts: That after an injury of this type headache follows in 67 per cent of the cases. This is intractable in some cases. Also dizziness, ringing of the ears, optic nerve injury, deafness, nervousness, fatigability, insomnia—the percentages are as follows: Dizziness, 60 per cent; ringing of the ears, 9 per cent; optic nerve atrophy, 19 per cent; deafness, 11 per cent; nervousness, 20 per cent; fatigability, 13 per cent; insomnia, 7 per cent. In other words, according to these percentage figures, considering Mr. Rowley's injury, he has a great likelihod of never ever being free of any one of these miserable symptoms * * * There is no other authority I would care to read to the Court in connection with my prognosis."* (Italics ours.) (T. R. 47, 48, 49.)

In his counter-praecipe, appellee sought to include in the record the following papers of record in said cause:

"1. Pages Numbered 534 to 540 inclusive, subentitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel S. Wechsler, M. D., Fifth Edition, Revised, 1944, W. B. Saunders Company—All filed in the records of the Court on January 14, 1947, and referred to by District Court in Findings of Fact and Conclusions of Law." (T. R. 171.)

In accordance with the counter-praecipe, the following appears in the transcript of the record, pages 172 through 182:

" 'A Textbook of Clinical Neurology' with an Introduction to the History of Neurology, by Israel S. Wechsler, M. D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944.

Page 534—'Fracture of the Skull.

'Fracture of the skull is accompanied by loss of consciousness in more than 95 per cent of cases. If there is no tearing of the meninges, bleeding within the skull, or compression of the brain, the coma is not deep and consciousness is regained within a few minutes. If there is edema of the brain, with marked compression, particularly on the medulla, the coma is profound and may last hours or days. The pulse is slow, breathing is deep, stertorous or Cheyne-Stokes, the face is flushed, the extremities cold, the pupils at first contracted, later dilated, and fixed. The latter may be unequal, the dilated pupil generally being on the side of the cerebral injury. Should the cerebral compression increase, the patient may die within an hour or linger on for several days without regaining consciousness. He may come out of the coma for a time, then relapse and die of cerebral compression from hemorrhage or edema. The danger signs are deepening of the coma, loss of vesical and rectal control, rise of temperature, fall of blood pressure, and increase in respiratory and pulse rate. In the absence of infection, fever is, as a rule, absent.

'Generally, there is a hematoma over the site of the injury, and sooner or later echymoses about the eyes, mastoid or back of the neck appear. The latter are often present in fracture of the base

of the skull. In such cases, too, one or more of the cranial nerves may be paralyzed. Paralysis of the face is not uncommon if the fracture passes through the petrous pyramid. The cochlear nerve may also be affected and give rise to temporary or permanent deafness. The sixth nerve is not infrequently involved, resulting in internal strabismus and diplopia. Retinal hemorrhages are occasionally present. Fracture through the optic foramen may lead to unilateral optic atrophy and blindness. Fracture of the vault is generally unaccompanied by cranial nerve palsies. Should there be local hemorrhage or focal injury to the brain, irritative signs appear in the form of jacksonian or generalized convulsions, followed by monoplegia or hemiplegia. The local signs and symptoms, such as aphasis, hemianopsia, sensory disturbances, ataxia, etc. (discussed under Focal Diagnosis), differ in no way from those caused by any other lesion. Occasionally there is papilledema, possibly more marked on the side of the injury.

'As the patient recovers consciousness he may vomit. During the gradual recovery there is still clouding of consciousness, and after this is regained there may be complete amnesia. Occasionally one observes delirium or psychotic state, such as is seen in alcoholism or general paresis, lasting from a few hours to several days or even weeks. In the case of frontal lobe lesions, besides the possibility of psychotic manifestations, there may be moria or Witzelsucht, apathy and akinesia. Generally the patient complains of severe headaches, dissiness, and ringing in the ears. If a lumbar puncture is performed the fluid may come out under increased pressure and be mixed

with blood in the case of hemorrhage into the subachranoid space.

'Aside from the possibility of progressive meningeal hemorrhage, which will be discussed separately, infection carried in through the fractured skull may result in pyogenic meningitis (q.v.), in the formation of an epidural abscess or deep-seated abscess of the brain. Should ominous rigidity of the neck set in, the headaches be very severe, p*re*sistent, and localized, or stupor increase, the possibility of these complications must be thought of. But while all these complications may set in early they not infrequently occur weeks or even months after the injury. Traumatic encephalopathy may also be mentioned as a possibility. In many cases there is a proliferative gliosis secondary to the brain injury. Generally, the acute signs and symptoms recede, leaving behind residual manifestations.

'Besides the residual focal paralytic signs the patient often complains of persistent headache, pressure in the head, dissiness; noises in the ears, spots before the eyes, hypersensitiveness to light and sound, poverty of memory, and general mental and physical fatigability. He may be drowsy or complain of insomnia. Glysosuria may follow fracture because of injury to the hypothalamic or interventricular regions (also the floor of the fourth ventricle). The pulse may be slow, the hands tremulous, the reflexes hyperactive. The patient cannot concentrate his attention, and loses his energy; he feels the blood rushing to the head, suffers pain over the heart, is irritable, anxious, moody, or has outbreaks of anger. All or some of these manifestations may persist for a

variable period of time; sometimes there are few or none. Pnuemocephalus (accumulation of air within the cranial cavity) occasionally follows fracture through the sinuses or in other cases where the dura is ruptured. It is characterized essentially by headaches (signs of increased intracranial pressure) and sometimes by rhinorrhea.

'While it is difficult to establish a definite parallelism between the severity of the cerebral injury and the mental symptoms just enumerated, a great many patients who have sustained fractures of the skull show residual emotional and intellectual disturbances. Many have diminished capacity for work, as can be demonstrated by actual tests. Numerous investigators have studied under laboratory conditions the weakened "faculties" of soldiers who received head wounds during the war, and in many cases concluded that the defects could be fairly well correlated with the particular location of the brain injury. Thus, lengthened association time, easy mental fatigability, frequent errors, defective will or inhibition, and diminished power of attention were found in frontal lesions. Less marked but similar intellectual defects were also observed in temporoparietal injuries, while impaired ability in calculation was especially characteristic of occipital lobe defects. Curiously, poverty of attention was found to be greater in occipital than frontal lobe lesions. In general, the higher psychic and intellectual functions were impaired to a greater extent in left-sided lesions of right-handed individuals; this was particularly true of frontal and parietal lobe injuries.

'In addition to the "nervous" complaints, which are undoubtedly due to organic brain changes, a number of hysterical symptoms may be engrafted. Desire for industrial or other compensation, the existence of personal conflicts for which the brain injury offers a compromise outlet, bad advice by lawyers or mismanagement by physicians are frequently the mainsprings of the psychogenic manifestations. Among these may be mentioned exaggerations of actual symptoms, unwillingness to cooperate, and resentfulness. Occasionally one observes hysterical paralyses and anesthesias, mutism, aphonia, stammering, tremors, twilight states, or attacks of unconsciousness, and even convulsions. Most of these symptoms generally appear some time following the injury, after a so-called "incubation period", and are to be observed in 10 to 15 per cent of cases.

'Traumatic epilepsy occurs in a number of persons who have sustained fractures of the skull. The estimates range as high as 30 per cent. This is undoubtedly an exaggeration. Five to 10 per cent is nearer the truth, and then it depends on the nature of the injury. While the convulsions may become manifest soon after the injury, they generally set in a few months or years later. The epileptic attacks are most apt to occur in injuries in or near the motor cortex, but may follow lesions anywhere in the brain. Nor need the original injury have been necessarily severe, although the more extensive the lesion, the more likely the traumatic epilepsy. The convulsions may be jacksonian or generalized; there may be only periodic fainting or merely petit mal attacks. Sensory jacksonian fits may occur in parietal lobe lesions.

Twilight states, periodic alteration of character, fits of bad temper, or affective hyperirritability and other equivalents may represent some of the psychic epileptic manifestations. I have seen narcolepsy follow fracture of the base of the skull.

'Delayed apoplexy (Spatapoplexie) occasionally occurs after trauma to the head. The interval between the receipt of the injury and the acute cerebral hemorrhage is given as from six days to as many weeks. In most of the cases where the connection was established, cerebral vascular disease, namely, arteriosclerosis, was also found, so that the trauma can be considered only as precipitating or exciting and not an ultimate cause. 'Late Complications.—Aside from the occurrence of the late complications such as traumatic encephalitis, abscess, meningitis, and epilepsy, one may also mention cysts of the brain, arachnitis, and serious meningitis. The latter may occur weeks after trauma to the head and give rise to signs of increased intracranial pressure, especially stupor, coma and papilledema. This really is a subdural hydroma (see subdural hematoma). At operation one may find a large amount of serous or blackish serosanguineous fluid, with marked flattening of the brain. Evacuation of the fluid results in recovery.

'Diagnosis.—The diagnosis of fracture of the skull is not difficult. Prolonged unconsciousness, the presence of cerebral nerve palsies, depression at the point of injury, bleeding from the mouth, nose, or ears, and escape of cerebrospinal fluid are fairly strong evidence of fracture. (Bleeding from the orifices caused by local injury is gen-

erally slight and temporary.) But one may exist in the absence of all those signs. Conversely, meningeal hemorrhage alone may give rise to many of the symptoms of fracture, while the presence of blood in the cerebrospinal fluid obtained on lumbar puncture may be evidence of either. None the less, bloody cerebrospinal fluid following a blow to the skull is very significant of fracture. An X-ray examination of the skull, therefore, is always indicated and should never be omitted, if for no other than medico-legal purposes. But a fissured fracture may be present and not be demonstrable on the X-ray plate; it is advisable therefore, to take stereoscopical pictures. Sometimes only necropsy reveals the presence of a fracture. The electroencephalogram may show evidence of an organic lesion of the brain in the case of fracture; improvement in the electroencephalographic tracings runs parallel with recovery.

'Prognosis.—The prognosis varies with the severity and location of the injury to the brain. Immediate or early death occurs in a great many cases. The death rate is high in lesions in the neighborhood of the medulla and frontal lobes. Fracture through the frontal sinus may result in late meningitis. Generally, fractures of the base are more dangerous than those of the vault. Depressed and comminuted fractures offer a worse prognosis than simple fissured ones. Compound fractures carry the possibility of infection and subsequent meningitis or abscess. Loss of deep reflexes, drop in blood pressure, and fixed, dilated pupils are of ominious significance. In general, fractures of the skull are not only immediately

serious, but may leave behind grave and permanent sequels. A great many patients never recover at all. Complete recovery and return to former occupation or previous intellectual vigor is not at all rare. However, recovery may take months or even years, and no definite prognosis can be ventured before all possibility of the occurrence of late complications has passed. Permanent deafness, facial paralysis, ocular palsy- and even optic atrophy may remain after fracture of the skull.

'Treatment—The treatment varies with the type of fracture of the skull and extent of injury to the brain. The first problem is to ameliorate the effect of compression and prevent infection. In simple fracture expectant treatment is the best. The patient is kept in bed, and, if necessary, sedatives (bromides and chloral) are administered. Morphine is generally held to be contraindicated, because it increases intracranial pressure; but it is a question whether there is increased pressure in all cases of fracture. In compound, comminuted, and depressed fractures the wound is exposed and thoroughly cleaned, blood clots, bone splinters, and foreign bodies are removed, and if brain tissue is destroyed it, too, is removed. During the war neurosurgeons practiced wide exposure of compound fractures and thorough removal of all tissue likely to harbor infection—debridement. Most surgeons are of the opinion, and I think justly, that conservative treatment is best, and they defer all operative inference until absolutely necessary. The war, however, taught that radical treatment is preferable in all cases of compound fractures, and, unless the patient is in profound shock, operation

may be immediately performed. Obviously, turning down an osteoplastic flap, removing blood clots, and ligating bleeding vessels are indicated in localizable meningeal hemorrhages. All operations, of course, must wait until shock is over and the patient's condition warrants surgery. In the case of late serous meningitis, or effusions of serosanguineous fluid, repeated lumbar puncture and, if necessary, cerebral decompression is indicated. This is also advisable in case of cerebral edema, although other methods for reducing intracranial pressure also are available. In general, fractures of the base are not accessible to operations and had better be left alone. Operation is naturally indicated when either an epidural or cerebral abscess is present or suspected.

'Spinal puncture is frequently employed both for determining increase in intracranial pressure and reducing it, and for detecting the presence of blood in the case of subarachnoid hemorrhage. Repeated spinal puncture is not necessary. Some surgeons are of the opinion, erroneously, I believe, that lumbar puncture is contraindicated in compound fracture because of the possibility of facilitating infection of the meninges by the reduction of intracranial pressure. The latter can be accomplished effectively by the administration of hypertonic solutions of glucose, salt, or magnesium sulphate (see Tumors of the Brain). Hypertonic solutions are said to be contraindicated in case of shock and hypotension and where there is evidence of severe compression or cerebral contusion. Recent experiments even point to a rise after temporary reduction; hence suggest that lumbar tap is better. Sucrose may be better, as it does not cause a secondary rise. In view of

the fact that meningitis may develop in a certain number of cases, the suggestion has been made that in addition to antitetanus serum antistreptococcus and antipneumococcus serum also be given. The last are no longer necessary, as chemotherapy is more effective; wherefore sulfadiazine or one of the other sulfonamides should be administered.

'The subsequent surgical treatment of late complications, especially of epilepsy, depends on the nature of the lesion. The work of Foerster and Penfield and others indicates its value in selected cases and particularly in those with focal convulsions. Removal of bone defects and meningeal or brain scars may be followed by cure. Sedative therapy should be kept up for a long time after operation. Obviously encephalography should precede operation and, if possible, electrical cortical stimulation for purposes of localization should be done during it. Plastic operations for defects in the skull are occasionally of value, but sometimes aggravate the existing condition. The medicinal treatment is purely symptomatic, and the management of residual paralyses differs in no way from those occurring in the course of vascular accidents (see Apoplexy). The headache and the numerous other "nervous" manifestations are frequently intractable. Lumbar air insufflation has been suggested for the chronic posttraumatic headache. The convulsions are treated in the same way as those occurring in "idiopathic" epilepsy, namely, with phenobarbital, dilantin, bromides, etc. Attempt should be made at reeducation, and psychotherapy employed in the hope that the patient may be restored to a fair degree of usefulness.' "

Following the above quoted material, appears this certificate of the trial Court:

> "The foregoing seven and one-third pages of typewritten matter have been copied from pages 534 to 540, inclusive, of 'A Textbook on Clinical Neurology,' etc., by Israel S. Wechsler, M.D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944, *and are a true copy of the original text of said work considered in arriving at the decision embodied in the Judgment* in the case of Frank Rowley v. Z. E. Eagleston, cause No. A-4239 of the District Court for the Territory of Alaska, Third Division. No other part of said book was considered. The foregoing is the material referred to in the latter part of Paragraph IV of the Findings of Fact in said cause signed and entered on Dec. 27, 1946.
>
> /s/ ANTHONY J. DIMOND,
> District Judge."
>
> (T. R. 182.) (Italics ours.)

Paragraph IV of the findings of fact contains the following:

> "* * * *that in the fixing of said amount of Thirty-seven Thousand Dollars, pages 534 to 540,* inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an introduction on the History of Neurology,' by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company, *were considered."* (T. R. 10.) (Italics ours.)

The exceptions taken by appellant to the findings of fact contain the following:

"Defendant excepts to Finding of Fact No. III, wherein the Court finds that plaintiff has suffered damage in the amount of Thirty-seven Thousand Dollars ($37,000.00), * * * on the ground that such finding was based partially upon improper evidence as detailed in paragraph IV of said Findings of Fact." (T. R. 12.)

It is apparent from the foregoing excerpts from the record that the trial Court not only allowed the doctor, under direct examination, to read from a medical textbook into the record, but, in addition thereto, allowed the actual introduction of pages of that work into evidence and then relied heavily thereon in making his findings, conclusions and judgment.

It is almost universally held that such a procedure constitutes prejudicial error.

The general rule recognized in all states in which the question has arisen (except Alabama) is that treatises are not admissible to prove the truth of the statements therein contained.

65 *A.L.R.* 1102;

Jones Commentaries on Evidence (Horwitz), Vol. 3, Sec. 579, p. 742.

One of the recognized grounds for excluding excerpts from medical books and treatises as evidence of the truth of the statements therein contained is that the opportunity for cross-examination is lacking, and the accuracy or exact weight to be given the author's declarations cannot be tested, as is the case with other witnesses.

Some of the cases adhering to the rule stated above are:

U. S. v. One Device, etc. (1947), 160 Fed. (2d) 194, 198;

U. S. v. Paddock (1946), 68 F. Sup. 407, 409;

Union Pac. Ry. Co. v. Yates, 79 Fed. 584, 587;

Samuels v. U. S., 232 Fed. 536;

McEvoy v. Lommel, 80 N.Y.S. 71, 73, 78 App. Div. 324;

Foggett v. Fischer, 48 N.Y.S. 741, 23 App. Div. 207;

Mo. K. & T. Ry. Co. of Tex. v. Robertson (Tex. Civ. App.), 200 S. W. 1120;

Commonwealth v. Sturtevant, 117 Mass. 122, 139;

Boyle v. State, 57 Wis. 472, 478, 15 N. W. 827;

Marsh Wood Products Co. v. Babcock & Wilcox, 207 Wis. 209, 240 N. W. 392, 400;

Winters v. Rance, 125 Neb. 577, 251 N. W. 167, 168, 169;

Percoco's Case, 273 Mass. 429, 173 N. E. 515;

Edwards v. Union Buffalo Mill Co., 162 S. C. 17, 159 S. E. 818, 820;

Baker v. So. Cotton Oil Co., 161 S. C. 479, 159 S. E. 822;

People v. Wheeler, 60 Cal. 581;

Gallagher v. Mar. St. Ry. Co., 67 Cal. 13, 6 Pac. 869;

People v. Goldenson, 76 Cal. 328, 348, 19 Pac. 161;

Lilley v. Parkinson, 91 Cal. 655, 656, 27 Pac. 1091;

Baily v. Kreutzmann, 141 Cal. 519, 521, 75 Pac. 104.

In *Union Pacific Railway Co. v. Yates, supra,* plaintiff offered in evidence and was allowed to read to the jury, certain extracts from a book published by Dr. Erichsen on Concussion of the Spine, Nervous Shock and other injuries to the nervous system. After quoting the portions of the textbook which were read, in its opinion the 8th Circuit Court of Appeals said (page 587):

> "The admission of the aforesaid extracts from the writing of Dr. Erichsen constitutes the chief error that has been assigned. We think that the testimony in question was clearly incompetent when judged by common-law rules of evidence. The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authoritative, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps a more important, reason for rejecting such testimony, is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease,

> or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truths of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons it is very generally held that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts, it is safer to rely on the testimony of competent witnesses, who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury. (Citing cases.)"

In *Baily v. Kreutzmann, supra,* where two doctors were permitted to recite instances from medical reports and authors, the California Supreme Court said, at page 521:

> "It has been held, without conflict and in an extended line of cases in this state, that medical works are hearsay and inadmissible in evidence, except perhaps on cross-examination when a specific work may be referred to, it seems, to discredit a witness who has based his testimony upon it."

Nor does the fact that the case at bar was partially tried in the absence of a jury vary the rule. The *Percoco's Case, supra,* was an industrial accident case tried before a trial examiner in the absence of a jury. Nevertheless, after discussing the general rule contended for herein, the Massachusetts Supreme Court said:

> "The admission of this evidence was prejudicial error. The member may have relied on some of

the statements in the treatise, and for this reason the case must be referred to the Industrial Accident Board for rehearing."

The Court will bear in mind that in the case at bar the trial Court positively stated in his findings and in his certificate to the counter-praecipe that he relied upon Dr. Wechsler's Textbook used as evidence herein. (T. R. 10, 182.)

SECOND POINT RAISED.

IT IS PREJUDICIAL ERROR FOR THE TRIAL COURT TO ALLOW THE LIFE INSURANCE AGENT TO GIVE HIS OPINION AS TO APPELLEE'S ABILITY TO OBTAIN LIFE INSURANCE IN THE FUTURE.

6. That prejudicial error was committed in admitting into evidence, over the objection of appellant, the opinion of a life insurance agent as to appellee's ability to obtain life insurance.

Hugh Daugherty testified that he had been a life insurance agent for about ten years and that he had had experience in gathering and interpreting actuarian data. (T. R. 132.) After introducing into evidence certain mortuary tables which indicated that the life expectancy of a man the age of appellee is 27½ years, the following transpired:

"Mr. Hellenthal. Now, Mr. Daugherty, could a man who had suffered a compound, compressed, depressed fracture of the skull obtain life insurance?

Mr. Curry. We object, if the Court please. The witness hasn't qualified yet as any expert to pass upon the subject; and it is immaterial.

> The Court. Objection overruled.
>
> Witness. I would answer that 'No,' that there would be no possibility of that man obtaining insurance." (T. R. 136.)

Undoubtedly the trial Court relied on this testimony in making his decision herein as he specifically refers to the life insurance data in his finding. (T. R. 10.)

It is apparent, from the record, that Mr. Daugherty was not qualified to pass upon appellee as a life insurance risk, nor was such evidence admissible.

> *New York Life Ins. Co. v. Long,* 199 Ky. 133, 250 S. W. 812;
>
> *Schwarzbach v. Ohio Valley Protective Union,* 25 W. Va. 622, 52 Am. Rep. 227;
>
> *Rawls v. Amer. Mut. Life Ins. Co.,* 27 N. Y. 282, 84 Am. Dec. 280;
>
> *Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.,* 72 Fed. 413, 429.

In the *Rawls* case, *supra,* insurance experts and doctors were allowed to testify that because of excessive use of intoxicating liquor a man would not be a desirable life insurance risk. In commenting on this evidence, the Supreme Court of New York said (p. 293):

> "This testimony was incompetent, both on principle and authority. It was of no consequence what, in the opinion of these physicians in certain cases, and under a certain state of facts, would be a good or bad risk for a life insurance company to take, or what circumstances should be

considered on the question of increasing or lessening the rates of insurance. These witnesses might give their opinion on matters of science connected with their profession; but were not receivable to state their views of the manner in which others would probably be influenced, if certain specified facts existed."

The following language taken from the *New York Life Insurance Company* case, *supra,* is especially applicable to the witness Daugherty.

p. 814: "A local life insurance agent whose only connection with that business was shown to be a solicitor of policies, was introduced and allowed to give his opinion as to the materiality of the proven false answers and to state that, according to his opinion, life insurance companies generally, and especially the defendant * * * would accept the application and issue the policy * * *."

"It seems to us that the incompetency of that testimony is so apparent that we need take but little time or space in its discussion. None of the witnesses qualified themselves as experts in passing upon the desirability of risks by those engaged in the life insurance business, or showed a familiarity with facts and conditions entering into the determination of that question. * * * clearly, a witness not engaged in the business of determining such matters is wholly incompetent to give his opinion concerning them, and the court erred in admitting the testimony over defendant's objection and should have excluded it on its motion made for that purpose."

THIRD POINT RAISED.

THE DAMAGES AWARDED HEREIN ARE EXCESSIVE.

7. **The trial Court erred in its finding "That plaintiff has been injured in the premises in the amount of thirty-seven thousand dollars ($37,000.00), all in actual or compensatory damages;" for the reason that the sum mentioned in said finding is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted.**

8. **That the trial Court's conclusion of law and judgment are erroneous in finding that appellee is entitled to judgment in the sum of thirty-seven thousand dollars for the reason that said sum is excessive and not justified by the evidence introduced in the trial of said cause, to which judgment appellant excepted.**

The Court awarded appellee damages in the sum of $37,000.00. Although exemplary damages were prayed for in appellee's amended complaint, the trial Court specifically limited damages to "actual or compensatory damages." (T. R. 9.)

Appellee was injured on July 30, 1946. (Crim. T. R. 48; T. R. 31.)

He was in the hospital for twenty-two days, being released therefrom on August 21, 1946. (T. R. 40.)

He verified his original complaint in the civil action on September 10, 1946. (T. R. 3.)

He testified before the grand jury on October 1, 1946. (Crim. T. R. 32, 180.)

The criminal trial lasted from November 4th to November 14, 1946 (Crim. T. R. 42, 425) and appellee actively participated therein. (Crim. T. R. 170-188, 341-342.) He also participated in the civil trial. (T. R. 107-119, 120-122.)

In the civil trial, appellee gave a complete resume of his life, explaining in detail his schooling, his job experience and his earnings. (T. R. 107-115.)

He suffered a compound, comminuted, depressed fracture of the skull (T. R. 31) necessitating an operation to reduce the fracture, remove a number of fragments of the bone from the brain, replace some bone fragments and close the wound. (T. R. 32.) About two-thirds of an ounce by volume of destroyed brain tissue was removed from the wound. (T. R. 32, 33.)

Following the injury his condition continually improved, so that at the time of the trial his injuries were evidenced only by his subjective symptoms, i.e., his complaints of headache, ringing of the ears and dizziness. (T. R. 80, 81.) He had normal equilibrium; he was mentally in touch with his environment; was coherent and had good coordination. (T. R. 75, 80, 81, 84.) He had no loss of strength nor loss of reflexes. (T. R. 75, 76, 84.) His appetite was good and his weight had increased. (T. R. 83.) There is no substantial conflict in the record between the doctors as to appellee's objective symptoms and his physical appearance.

All four of the doctors who testified agreed that appellee should attempt to return to work. (T. R. 49, 66, 72, 73, 93.) None of the doctors would predict as to how long appellee would be prevented from resuming his regular employment. (T. R. 49, 66, 72, 73, 94.)

Appellee's expenses were found by the trial Court to amount to $1494.25 (T. R. 9) and the trial Court

expressly limited any consideration of loss of profits from the operation of appellee's business as an element of damage. (T. R. 9, 10.) The award of $37,000, with the exception of the medical expense of approximately $1500, is, therefore, expressly limited to the pain and suffering flowing from his wounds, and consideration of the discomforts resulting from his subjective symptoms of headaches, ringing of the ears and dizziness.

Appellant submits that under the authorities an award of $37,000 for the injuries sustained by appellee is excessive.

In *Daraska v. Dauksha* (1945), 327 Ill. App. 333, 64 N.E. (2d) 204, an award of $2000 was given for injuries including a fracture of the skull, swelling, bulging and discoloration of the right eye causing a loss of approximately $600 in salary and confinement to the hospital for three weeks for a woman who had been earning an average of $30 a week.

In *McMullen v. U. S.* (1947), 75 Fed. Sup. 164 (in which judgment was rendered by the Court, sitting without a jury), a twenty-six year old woman sustained a fracture of the pelvis and left ankle, a brain concussion, permanent hematoma on the left thigh, and a one-inch shortening of the left leg. She was confined to the hospital for nearly six months, required to wear a walking caliper thereafter and was unable to work for five months after leaving the hospital. The Court awarded her $10,000 damages, plus a hospital bill of $1251.25 and wage loss of $1518.00.

In *Richter v. Hoglund* (1943), 132 Fed. (2d) 748, one of the plaintiffs sustained the following injuries in an automobile accident: rendered unconscious until the day following the accident; necessary to strap him to the bed; suffered great shock; was unable to work an entire summer; suffered a concussion of the brain resulting in a defect in equilibrium. At the trial he was suffering from headache, dizziness and backache; he had three large cuts on his face, resulting in scars, one of which disfigured his left ear. He had complete loss of muscle control of the left half of his forehead—muscle paralysis. He had an area of hyperesthesia (sensitiveness) in front of his ear. There was a large area between his eye and ear in which there was no sensation whatever. He sustained great pain and suffering.

The jury returned a verdict of $15,379.70. The trial Court reduced this to $15,000.

The other plaintiff sustained a head injury; a cut across his nose and a fracture thereof, displacing the septum to the right which almost completely obstructed breathing through the right nostril. He had headaches and dizzy spells for a year. There was a piece of steel imbedded in his skull which should be removed. The jury gave him a verdict of $4697 which the trial Court reduced to $4000.

With respect to this judgment, the Circuit Court of Appeals (C.C.A. 7th) said:

> "*While this verdict is substantial for the injuries received,* we do not think it so excessive as to

indicate undue prejudice, passion or corruption on the part of the jury." (p. 752.) (Italics ours.)

In *Kambourian v. Gray* (Oct. 1947), 81 A.C.A. (Cal.) 941, 185 Pac. (2d) 27, which was an action for damages for assault and battery, the plaintiff sustained lacerations of the left ear and left eye and a severe concussion. Eighteen months after the injuries, plaintiff still had severe headaches, vertigo and nervousness, and there was medical testimony that there was a permanent injury to the brain which would not get better and which would probably get worse. There was definite impairment of plaintiff's ability to work. The jury returned a verdict of $20,000 general damages and $5000 exemplary damages. These amounts were reduced by the trial Court to $5000 and $1000 respectively. Commenting on the action of the trial Court in reducing the verdict, the Appellate Court said, page 947:

"The trial judge properly exercised his discretion in reducing the judgment upon motion for a new trial, *and we are satisfied from the record that he exercised it wisely.*" (Italics ours.)

In *Bacas v. Laswell* (La. App. 1945), 22 So. (2d) 591, 595, the Court said:

"We finally consider the quantum of damages. The wounds received by plaintiff were very serious and both litigants are, indeed, most fortunate that death did not result. During the time he was in the hospital, plaintiff was given at least eleven blood transfusions and his spleen was removed.

> Other injuries were—diaphragm fractured; lung punctured; left arm fractured, resulting in the paralysis of some of the muscles of the arm and hand and there still remains a bullet in plaintiff's back near his spine. Prior to the accident, plaintiff was a skilled workman, a shipwright, being in charge of a crew of shipfitters. As a result of the wounds he received, he has been unable to resume his normal occupation although he is a comparatively young man (43 years of age)."

The trial judge, evidently taking into consideration the poor financial condition of defendant, awarded plaintiff $3155. The Appellate Court, holding that this award was inadequate, increased the amount to $6000, after giving consideration to the defendant's ability to respond.

In *Willis v. Perinoni* (1929), 97 Cal. App. 764, 276 Pac. 359, plaintiff suffered a fractured skull and permanent injuries impairing his efficiency as a carpenter; affecting eyesight and causing numbness in his limbs. These injuries resulted from a malicious assault by the defendants with an iron bar. Both exemplary and actual damages were demanded.

An award of $5000 for these injuries was held not excessive.

In *Davis v. Randall* (1931), 17 La. App. 291, 135 So. 727, 728, the injuries and resultant damages awarded were described by the Appellate Court as follows:

> "The record shows that plaintiff expended on his son for doctor's, medical, and hospital bills, etc.,

the sum of $416.50, and the judgment in favor of plaintiff individually for that amount is correct. The amount of $1,583.50 awarded for the use and benefit of the minor, Wayne Davis, we think is entirely inadequate to cover the injuries received, the suffering and the humiliation. It is conclusively shown that Wayne Davis' skull was fractured in two places, and that, after a period of some three months after the assault and beating were administered to him, he began having a form of epileptic fits every time he would get the slightest tap on the head, or become overheated, and the fits grew worse and more prolonged each time, until some time in August, over a year after the assault, he had to be operated on and have a portion of his skull removed and the bloody water drained from his brain; and that, as a result of that operation, he has lost a year from college, and will be unable to do anything for a period of from twelve to eighteen months following the operation.

It is also shown that he was beaten about the back and hips, and that he could not stand on one foot for several days immediately following the beating; and that this unmerciful, unprovoked, and malicious assault took place in the presence of some eight or ten of his friends and associates, naturally causing him great humiliation, as well as pain, suffering, and permanent injury. It is shown that, while the doctors are of the opinion that he will finally recover from the operation performed on him, he has a small unprotected hole in his skull, where an opening had to be drilled in connection with the operation, and that he will always have the fear of a possible recurrence of

the epileptic fits, which the doctors say may happen.

We think a judgment for his use and benefit of $5,000 wil be adequate."

The Court will note that all of the above cases, with the exception of the *Davis* case, were decided in 1929 or in the period between 1943 and October of 1947. The judgment in the instant case was rendered in December of 1946. The economic condition of the country and the actual value of the dollar were substantially the same when the cited cases were decided as were conditions when the present judgment was entered.

The injuries in all the above cited cases were substantially more severe than those sustained by the appellee in the case at bar, yet in no case did the award granted by either the trial or the Appellate Court ever approach the figure of $37,000 awarded in this case. The error becomes even more apparent when we recall that there were no exemplary, but only compensatory damages awarded.

Speculative Future Damages.

Concerning the probability of permanent injury to appellee as the result of his injuries, Dr. Romig testified that appellee might have no end to his subjective symptoms of headaches, ringing of the ears, dizziness, nervousness, etc.; that these symptoms might become worse and that epilepsy could ensue. The doctor's opinion on epilepsy was based largely on Wechsler's

Textbooks, heretofore discussed. He then testified that appellee could go through life without epilepsy; that the continuation of the subjective symptoms might not happen, but that he would always have *some measure* of his present discomfort. (T. R. 45, 46.) He stated that appellee could not return to regular work at the time of the trial and that he could not say when he would be able to return to his regular job; that he, however, had advised appellee to work. (T. R. 49.)

Dr. Walkowski said that appellee's headaches and dizziness could continue, but he would not estimate for what length of time. He found no symptoms of epilepsy (T. R. 60) and was unable to state any possibility of insanity. (T. R. 62.) He was not in a position to state how much work appellee might be able to do. (T. R. 66.)

Dr. Coffin had no opinion as to a specified time when appellee's symptoms might stop. (T. R. 73.)

Dr. Davis stated he might have subjective symptoms for a year (T. R. 94) and might be hampered by headaches, ringing of the ears and dizziness, but that he would be physically able to work. (T. R. 95, 96.) He stated that appellee would not have a generalized epilepsy in the future; that he would have no contractures, and that there was no possibility of his acquiring meningitis (T. R. 100) or insanity. (T. R. 104.)

Appellant submits that the testimony above outlined is insufficient to sustain any portion of an award of $37,000 for future consequences of the injuries.

"To entitle a plaintiff to recover present damages for apprehended, future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a *reasonable certainty* that they will result from the original injury." (Italics ours.)

Bailey v. Yosemite Portland Smith Corp., 136 Cal. App. 111, 28 Pac. (2d) 65;

Silvester v. Scanlon, 136 Cal. App. 107, 28 Pac. (2d) 97.

"The respondent's own physician testified only to a *possibility* of permanent disability. Under Section 3283 of the Civil Code, 'Damages may be awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.' By this section, in an action for personal injuries the recovery is limited so far as physical suffering, or pain, or mental anguish are concerned to compensation for the consequences which have occurred up to the time of the trial, or *it is reasonably certain* under the evidence will follow in the future." (Italics ours.)

Bellman v. S. F. High School Dist., 11 Cal. (2d) 576, 588, 81 Pac. (2d) 894.

"To justify a recovery for apprehended future consequences, there must be evidence by such a degree of probability of occurrence as amounts to a *reasonable certainty* that they will result from the injuries alleged." (Italics ours.)

Sherman v. Frank (1944), 63 Cal. App. (2d) 278, 285, 146 Pac. (2d) 704.

To the same effect:

Matthews v. A. T. & S. F. Ry. (1942), 54 Cal. App. (2d) 549, 560, 129 Pac. (2d) 435.

Appellant earnestly contends that none of the testimony in the case at bar will sustain a finding of reasonable certainty of future permanent injury to appellee.

The damages for the period from the injury to the time of the trial consist of $1500 medical expenses, loss of earning for four and one-half months, and pain and suffering. By no stretch of the imagination could these damages justify an award of $37,000.00.

The Nature of the Altercation Between the Parties Should Be Considered by the Court in Awarding Damages.

There is considerable evidence in the record that appellee provoked the altercation and voluntarily entered into a fist fight with appellant (Crim. T. R. 90, 96, 127, 249, 279, 416, 417.) Moreover, the conflict took place on appellant's premises where appellee had gone and engaged in an argument over the price of an oil tank. (Crim. T. R. 190, 191, 249, 416.)

Under these circumstances, the Court should have considered appellee's actions in awarding damages.

Cornell v. Harris, 60 Ida. 87, 88 Pac. (2d) 498;

City of Gaffney v. Putnam, 197 S. C. 237, 15 S.E. (2d) 130;

Exposition Cotton Mills v. Crawford, 67 Ga. App. 135, 19 S.E. (2d) 835;

Barholt v. Wright, 45 Oh. St. 177, 12 N.E. 185.

The award of $37,000 clearly indicates that the trial Court gave no consideration to these mitigating circumstances.

For the reasons cited appellant contends that the damages awarded are excessive to a degree that requires reversal of the judgment herein.

CONCLUSION.

In summarizing, appellant submits:

I.

The trial Court committed prejudicial error in allowing excerpts from a medical textbook to be read into evidence as part of appellee's case in chief; in allowing pages from said textbook to become part of the record herein, and in considering and relying upon the content of said medical textbook in arriving at the damages awarded appellee herein.

II.

The trial Court committed prejudicial error in allowing a life insurance agent to give his opinion, in evidence, as to appellee's ability to obtain life insurance, inasmuch as said agent was in no sense qualified to give such testimony. In addition, the evidence so offered by the life insurance agent was clearly incompetent.

III.

The award to appellee of $37,000 as actual or compensatory damages was excessive and is not justified nor supported by the evidence herein.

For the foregoing reasons, we believe that the judgment should be reversed.

Dated, San Francisco, California,
May 20, 1948.

Respectfully submitted,
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